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CRIMINAL

No. 88-914

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER

v.

MARK ALAN RADKE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE
DISTRICT, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BEST AVAILABLE COPY

## QUESTION PRESENTED

1. Whether a citizen's warrantless seizure, without probable cause, for the purpose of custodial interrogation, violated the Fourth Amendment of the U.S. Constitution and the rule of Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d. 824].

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1. There is no reason for this Court to review the unpublished decision of an intermediate state court of appeal when the decision is based upon a factual finding with no applicability beyond the instant case.

2. The California Court of Appeal complied with Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d 824] where respondent was seized without probable cause, for the purpose of custodial interrogation, in violation of the Fourth Amendment.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Mark Alan Radke, respectfully requests that petitioner's request for a writ of certiorari seeking review of the unpublished opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, be denied.

## STATEMENT OF THE CASE

Respondent concurs with the petitioner's presentation of the procedural history of the case except to note that respondent filed his motion to suppress evidence, and points and authorities in support thereof, prior to the April 5, 1988 preliminary hearing. Petitioner did not file a response.

The California Court of Appeal stayed the issuance of the remittitur until December 15, 1988.

## STATEMENT OF THE FACTS

In the early morning hours of January 22, 1988, the family of Jeffrey Vance Rudiger, age sixteen, filed a missing person report with the San Diego Police Department. Mr. Rudiger was a responsible high school student who came home after either school or work, but who failed to return home on the evening of the 21st. Rudiger was last seen by friends leaving his place of employment, a hair-cutting store, between 8-8:30 P.M., on the evening of January 21, 1988 (PHT 8, 193).[1/]

Police began to investigate the missing person report and learned from Rudiger's friend Justin Valdivia that he planned to meet "Mark" after work. Police soon discovered Rudiger's car located in a parking lot near Chuck E. Cheeze restaurant and near the hair-cutting store where Rudiger was employed.

On January 22, 1988, at 9:10 A.M., officers of the San Diego Police Department were dispatched to 10695 Treena Street, in the Scripps Ranch area of San Diego, regarding the discovery of a body of a white male juvenile. Officers discovered the deceased lying in the driveway of a commercial complex at that address.

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[1/] PHT refers to the preliminary hearing transcript. RT refers to the Superior Court Transcript. California Penal Code section 1538.5(i) authorizes the Superior Court to consider the transcript of the preliminary hearing at the special hearing on the motion to suppress evidence.

The victim appeared to have suffered stab wounds and other types of trauma over his head and body. He was identified as the missing Jeffrey Rudiger.

At the scene, police observed tire tread marks in blood near the body (PHT 7).

Detectives determined that Mark Radke (respondent) worked at Chuck-E-Cheeze and decided to contact him concerning the homicide.

At approximately 7:30 P.M. on the evening of January 22, 1988, Sgt. James Manis and Detective Gary Murphy viewed the tires on Radke's car while it was parked at Chuck-E-Cheeze restaurant (PHT 20, 48). The officers were aided by a flashlight (PHT 22). The front tires of Radke's car appeared to be the same or similar to the tread pattern found at the scene (PHT 9, 22, 23, 48). While the police waited for Radke, he left work and drove off without being noticed. A short time later, police located Radke's car at the home of a friend. They waited until Radke came out of the home and proceeded to follow him. At 10:00 P.M., Radke stopped at a traffic light on Mira Mesa Boulevard. Detectives were behind him in their unmarked car and called for a marked patrol unit. Sgt. Manis and Detective Jerry Wiggins, both in civilian attire, decided to get out of their car and approach Radke. They both approached from the driver's side and Wiggins had his gun drawn (PHT 13).[2/] Radke was not free to leave once police approached the car (PHT 25).

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[2/] Sgt. Manis testified that Detective Wiggins had his gun drawn and that it was the usual practice to point the pistol at the suspect's body so he would notice it (PHT 25). Wiggins recalled drawing the gun, but didn't recall whether he pointed it at Radke (PHT 64).

Radke submitted a declaration, under penalty of perjury, prior to the preliminary hearing, that police approached "with guns drawn and pointed at my head, and told me to get out of the car." The People failed to file a responsive pleading to the motion to suppress in Municipal Court and never challenged Radke's declaration or moved to strike it. California Code of Civil Procedure Sections 2009 and 2015.5 sanction the use of affidavits and declarations in support of a motion.

He was told to turn off the engine and to get out of the car (PHT 12). Manis and Radke walked back to the detective's car where Radke was handcuffed and placed in the car. While Manis was handcuffing Radke he noticed Radke's hands appeared bruised (PHT 14).

A few minutes later, a marked patrol car arrived at the scene. Radke was transferred to the marked patrol car and transported to the San Diego Police Department. The Toyota Celica was impounded by the police (PHT 14).[3/] Radke remained handcuffed during the trip to the police department where he was taken up to the fourth floor. He was left in a room for approximately thirty to forty minutes and then transferred to an interrogation room. The handcuffs were taken off during the interrogation.

The interrogation began shortly before 11:00 P.M. and was conducted by Detectives G. E. Murphy and Jerry Wiggins, after Miranda warnings, for an hour (PHT 15). During the course of the interrogation, Radke was questioned about his whereabouts on the evening of the 21st of January and whether or not he had anything to do with the Rudiger murder. During the interrogation, Radke was searched and keys, game tokens, and a battery were seized from his coat pocket. Towards the end of the interrogation, Sgt. Manis entered the room and had Radke execute a consent form for the search of the Toyota Celica (PHT 15, 37,). He accused Radke of being involved in the Rudiger murder. Radke asked for an attorney and questioning terminated. Radke was removed to another area of police headquarters where he was photographed and told to give samples of blood, breath, urine, and fingernail scrapings, as well as fingerprints, handwriting exemplars, and hair.

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[3/] The impounding officer filed a report that "Mark Radke was arrested for homicide. He was taken to the homicide office for questioning. The vehicle was impounded and taken to Central P-2 level parking homicide cage per Sgt. Manis."

At the conclusion of the processing, Radke was transported to his residence.

A subsequent search of Radke's Toyota automobile revealed alleged bloodstains on a cardboard visor in the trunk, on the front driver's floormat area, and on the inside area of the left front fenderwell. Subsequent analysis by the police department lab indicated that some of the bloodstains were the victim's type "A", with enzyme PGM 2-1. Radke's blood is type O. Seized from Radke during his interrogation was his grey jacket and two Chuck-E-Cheeze tokens. The jacket and tokens had red stains which later tested presumptively for blood. On the basis of this information, police sought a search warrant for Radke's home. The warrant was executed on the second day of February, 1988. Radke's home was searched and he was arrested for the murder of Jeffrey Rudiger.

## REASONS WHY PETITION SHOULD BE DENIED

1. There is no reason for this Court to review the unpublished decision of an intermediate state court of appeal when the decision is based upon a factual finding with no applicability beyond the instant case.

2. The California Court of Appeal complied with Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d 824] where respondent was seized, without probable cause, for the purpose of custodial interrogation in violation of the Fourth Amendment.

## ARGUMENT

1. THERE IS NO REASON FOR THIS COURT TO REVIEW THE UNPUBLISHED DECISION OF AN INTERMEDIATE STATE APPELLATE COURT WHEN THE DECISION IS BASED UPON A FACTUAL FINDING WITH NO APPLICABILITY BEYOND THE INSTANT CASE.

The Court will generally deny certiorari when a lower court decision turns upon the analysis of the particular facts involved (United States v. Johnston (1925) 268 U.S. 220, 227 [69 L.Ed 925]).

Petitioner herein is seeking review of adverse factual findings that have no effect beyond the instant case. The California Court of Appeal decision was unpublished and may not be cited as precedent without violating California rules of court (Rule 977, California Rules of Court).

There are no special or important reasons for this court to exercise it's discretion and grant review on writ of certiorari.

2. THE CALIFORNIA COURT OF APPEAL COMPLIED WITH DUNAWAY V. NEW YORK (1979) 442 U.S. 200 [60 L.ED. 2D 824] WHERE RESPONDENT WAS SEIZED WITHOUT PROBABLE CAUSE FOR THE PURPOSE OF CUSTODIAL INTERROGATION, IN VIOLATION OF THE FOURTH AMENDMENT.

This case does not, as suggested by the petitioner, fall within the provisions of Rule 17.1(c) of the Rules of the Supreme Court of the United States. The California Court of Appeal did not decide a federal question in a way in conflict with applicable decisions of the Court. In reaching it's decision, the California Court relied upon and adhered to the principle of Dunaway v. New York (1979) 442 U.S. 200, Supra which condemns as a violation of the Fourth Amendment police seizure of an individual without probable cause, for purposes of custodial interrogation.

Although the California Court of Appeal relied on Dunaway in

reaching it's decision (slip opinion at A-3), petitioner failed to distinguish or cite Dunaway in their petition for certiorari.

California courts are bound by federal search and seizure law (In re Lance W. (1985) 37 Cal.3d 873 [694 P.2d 744]), (People v. Brown (1985) 169 Cal.App.3d 159 [215 Cal. Rptr. 101]), including Dunaway (Lozoya v. Superior Court (1987) 189 Cal.App.3d 1332) [235 Cal. Rptr. 77].

There is no conflict between federal and California law on the issue of seizures without probable cause for the purpose of custodial interrogation.

An encounter between a police officer and a citizen implicates the Fourth Amendment when the officer seizes the citizen (Terry V. Ohio, (1968) 392 U.S. 1 [20 L.Ed. 2d 889]). A suspect is seized within the meaning of the Fourth Amendment if the police act to compel a response, act in a coercive manner or restrict a person's freedom of movement. This includes a suspect who is forcibly stopped by police officers (Brown v. Texas, (1979) 443 U.S. 47 [61 L.Ed.2d 357]). A seizure occurs when a reasonable person would believe he is not free to leave (United States v. Mendenhall, (1980) 446 U.S. 544, 554 [64 L.Ed.2d 497]). A forcible stop of a car constitutes a seizure (Delaware v. Prouse, (1979) 440 U.S. 648, 653) [59 L.Ed.2d 660]) as does the surrounding of a suspect by three police cars (United States v. Pavelski, 789 F.2d 485, 488-89 (7th Cir. 1986) (See also United States v. Ceballos (1981) 654 F.2d 177, 184.)

A seizure must be supported by probable cause unless it falls within a narrow exception to the probable cause requirement reserved for police activity that does minimal violence to the "sanctity of the person." (Dunaway v. New York, (1979) 442 U.S. 200 Supra (quoting Terry v. Ohio, (1981) 392 U.S. 1, 20 Supra.)

This Court has outlined a number of factors for determining whether a seizure amounts to an arrest. These factors include

the freedom of the suspect to leave, the duration of the seizure and transportation of the suspect for custodial interrogation.

In Dunaway v. New York, (1979) 442 U.S. 200 Supra, the Court held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly "was `seized' in the Fourth Amendment sense," (Id. at 207), even though "he was not told that he was under arrest." (Id. at 203.) The issue was whether the station house detention on less than probable cause for the purpose of interrogation violated the defendant's Fourth Amendment right to be free from an unreasonable seizure. The Court recognized that the nature of the defendant's detention was critical in determining whether a seizure had occurred and emphasized both the length and the involuntariness of Dunaway's seizure.

> [T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape.

(Id. at 212.)

Likewise, moving a suspect to the station merely for fingerprinting requires probable cause (Hayes v. Florida, (1985) 470 U.S. 811, 816 [84 L.Ed.2d 705]), Davis v. Mississippi, (1969) 394 U.S. 721, 728 [221 L.Ed2d 676].

Here, respondent was not detained for a brief period of time, he was seized for a custodial interrogation. The California Superior Court, although it denied respondent's motion to suppress evidence, found the police had an unlawful purpose

when they stopped respondent's car.4/

Petitioner, rather than addressing this finding, and at the same time ignoring the appellate court's reliance on Dunaway, argues the Court of Appeal decision is in conflict with United States v. Hensley (1985) 469 U.S. 221 [83 L.Ed.2d 604].

Hensley, which cites Dunaway with approval (United States v. Hensley, Supra at 226), is factually distinguishable and generally inapplicable to the case sub judice.

Unlike Hensley, the record here is devoid of any testimony that detectives suspected respondent was armed, dangerous, or in the act of committing a crime. Nor was there any desire on the part of the police to question respondent at the scene5/ (See Terry v. Ohio (1968) 392 U.S. 1, Supra.)

Finally, Petitioner submits respondent's hands were personal characteristics exposed to public view, unprotected by the Fourth Amendment, but overlooks the fact that the police would never have seen respondent's hands but for their unlawful seizure. Their observations were a direct product of the primary illegality, the unlawful seizure, and were properly excluded

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4/"You can argue that the intent to take the defendant to the station, which intent was harbored at a time there was not probable cause, renders everything subsequent to the detention unlawful. And I think you have the better of it on the proposition that the officers did harbor what after the fact we can conclude was an unlawful intent when they stopped the car. They did testify that they planned to take the defendant down to the station, which was something they had no right to do without probable cause. And they didn't think they had probable cause." [RT 10-11]

Petitioner conceded in the Courts below that there was no probable cause at the time the respondent's car was stopped.

5/In the Superior Court, petitioner conceded that it was "the apparent intention of Detective Manis to take defendant into temporary custody for the purposes of questioning him and gathering available evidence." (Petitioner's points and authorities in opposition to defendant's motion to suppress evidence at 8).

(Brown v. Illinois (1975) 422 U.S. 590 [45 L.Ed.2d 416]).

CONCLUSION

The California Court of Appeal, adhering to decisions of the U.S. Supreme Court, found respondent was seized without probable cause in violation of the Fourth Amendment.

On petition for certiorari, petitioner essentially challenges the adverse factual finding of an intermediate state appellate court. The court opinion, unpublished, may not be cited as precedent and has no effect beyond the instant case.

The California Supreme Court, in denying review, left the Court of Appeal decision intact.

There are no special or important reasons for this Court to grant review, and the petition should be denied.

Dated: [illegible]

Respectfully submitted,

DOUGLAS COLTON BROWN
Attorney for Respondent